Phillips' brief

"AN IMBECILITY OF BODY AS WELL AS MIND": COMMON LAW AND THE SEXUAL (IN)CAPACITY OF BOYS

In a room at Cloughley's Hotel, Stacks Dam, somewhere in the colony of Queensland, sometime between the hours of 8 and 9 pm on Sunday 18 July 1897, William Farrell, a boy under the age of 11, penetrated William Moody, an adult male, age unknown. Two eyewitnesses observed the crime through a hole in the hotel room door. One testified that the boy's "dicky was out of his trousers and stiff".[1]

Two months later, Moody pleaded guilty to attempted buggery at the Rockhampton Supreme Court. The Crown accepted the plea. But when Griffith CJ examined the depositions more closely he was unsure if an offence had occurred. His attention was drawn to a particular case in Archbold's *Pleading, Evidence and Practice*, the leading practitioners' bible for criminal lawyers in England, Wales and other common law jurisdictions. He struck out the plea and reserved the matter for consideration by the Full Court.

The problem was Farrell's age and the sexual position he occupied in the alleged act. The boy had penetrated Moody, not the other way around. Despite a witness observing Farrell's arousal, common law had established that an irrefragable presumption of physical incapacity applied to boys under the age of discretion (at that time 14 years).

This legal fiction had considerable pedigree in England. According to Hale's *The History of Pleas of the Crown*:

> An infant under the age of fourteen years is presumed by law unable to commit a rape, and therefore it seems cannot be guilty of it, and tho in other felonies *militia supplet aetaten* in some cases hath been shewn, yet it seems as to this fact the law presumes him impotent, as well as wanting discretion.[2]

Blackstone would eloquently note sometime later that "as to this particular species of felony, the law supposes an imbecility of body as well as mind".[3] By and large, 19th century case law upheld this principle. The exception, it seems, was an 1849 English decision on sodomy in *R v Allen*.[4] This was the very case in Archbold to which Griffith referred.

In that matter, Allen, a receptive adult male had induced a boy of 12 to commit the abominable offence on him. The jury had found the defendant guilty, but the learned (unnamed) Baron was unsure whether the facts supported the offence. He requested expert opinion. The High Court unanimously found that the conviction was right. The judges' reasoning was not provided.

Almost half a century later, *R v Waite* would become the leading English case to uphold the doctrine that boys under the age of 14 could not commit an offence of a sexual nature. In 1892, at the Warwick Assizes, Enos Waite, a boy of 13, was charged with carnal knowledge of a girl of eight. The judge reserved his decision in this matter. Lord Coleridge CJ noted that the rule at common law had clearly been laid down by Hale:

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[1] *R v Moody*, Briefs, Depositions and Associated Papers in Criminal Cases Heard, Supreme Court, Central District, Rockhampton (1 March 1897 to 20 September 1897), Queensland State Archives, Item No 3546.

[2] Sir Matthew Hale, *Historia Placitorum Cronae: The History of the Pleas of the Crown: Published from the Original Manuscripts by Sollom Emlyn; with Additional Notes and References to Modern Cases Concerning the Pleas of the Crown by George Wilson* (T Payne, London, 1800) p 629.

[3] Sir William Blackstone, *Commentaries on the Laws of England. In Four Books. With an Analysis of the Work*, Vol 4 (Harper and Brothers Publishers, New York, 1852) p 212.

[4] *R v Allen* [1849] I Den 364; 3 Cox CC 270.

> Judges have time after time refused to receive evidence that a particular prisoner was in fact capable of committing the offence. That is perfectly clear and therefore unless the criminal law amendment act has altered the common law, which cannot be successfully contended, this prisoner has not committed the felony charged.[5]

In early November 1897, some 16,000 km across the seas, Griffith CJ, and Cooper and Real JJ, convened to consider the case of *Moody*. Griffith noted that *Moody* was "not indistinguishable" from *R v Allen*. "It is", he wrote, "the very same case; and, in that case, a very strong court held the conviction was good". But he also noted the decision in *Allen* was inconsistent with the leading case of *Waite*. It was impossible to reconcile the two, he said. The question was which line of authority to follow. The Chief Justice went on to say that:

> In my opinion the law with respect to offences of this character is that sexual capacity – that is, the absence of impotence – is an essential element of the offence. If the element is not present, there cannot be an offence. That is the law as laid down by Hale, and that is the only principle on which *R v Waite* can be supported.[6]

It followed that sexually receptive adult males could not be charged with attempting to commit buggery because the law established that young boys could not physically commit penetration on either males or females. Griffith's reasoning led him to argue that Moody could not be found guilty of his crime, or its attempt, in Cloughley's Hotel on that fateful Sunday night.

Cooper J agreed with the Chief Justice for the same reasons. Real J accepted the opinion of his brother judges reluctantly. "Personally, I would have come to an entirely different decision", he said. "Under the old practice it was plain and simple that emission was necessary to contribute the offence of carnal knowledge, and it was also necessary to constitute the abominable offence; and a boy under 14 years of age under that state of the law was held to be physically incapable of committing the offence". He pointed out that an amendment to the *Offences Against the Person Act* (1865) no longer required ejaculation. Buggery was complete on penetration. "[T]he grounds of the former decisions as to capacity were gone".[7]

In other words, Real J accepted the presumption that boys under 14 were incapable of ejaculation but not incapable of erection. The new definition of carnal knowledge taken with an eyewitness account that Farrell's "dicky … was stiff" led Real J to the personal conclusion that Moody's plea was sound. But he accepted that judges consistently (although not exclusively) presumed boys incapable of penetration and that this was also Parliament's view of the law. The Queensland decision to uphold the "imbecility" of the young male body was unanimous.

A plea of not guilty was entered in the case of *Moody* and the matter was remanded to the next criminal sittings. There, a *nolle prosequi* was entered by the Crown.

In upholding the legal fiction of sexual incapacity, the Queensland Full Court continued to provide legal licence for exploratory sexual behaviour by young males in a frontier world. The authority was subsequently codified in s 29 "Immature Age" of Griffith's *Criminal Code Act 1899*, in force as at 1 January 1901. And while the Full Court handed down its decision at a time when the penalty of death still applied for crimes of rape, the protection for youthful "male indiscretions" remained on the Queensland statutes until the end of the 20th century. It was removed in 1989.[8]

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[5] *R v Waite* [1892] 2 QB 600.

[6] Griffith CJ, *R v Moody* in Macleod T, *The Queensland Criminal Reports: Being a Reprint of all Criminal Cases Decided in the Supreme Court Reports, Vols 1 to 5 (1860 to 1881), the Queensland Law Journal and Notes of Cases, Vols I to XI (1881 to 1901) and the Queensland State Reports and Weekly Notes (1902 to 1907), with Annotations* (Law Book Company Ltd, Brisbane, 1913) p 346.

[7] Real J, *R v Moody*, in Macleod, n 6, p 348.

[8] Section 29 of the *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld).

That *R v Allen* involved sex between males, and was the single dissenting judgment in English case law, says much about the different historico-legal conceptions of sodomy and rape. The law always considered that boys under 14 were unable to commit crimes of a sexual nature on girls even if doctors and witnesses said they could. And while the prosecution of boys in homosexual cases generally failed, *R v Allen* indicates that there were exceptions to the rule. Physical incapacity, it seems, could be temporarily suspended in order to secure the conviction of passive adult males. Men who imitated women were considered especially dangerous to young boys. Given that the (unnamed) boy was not charged in *R v Allen*, this case also provided legal protection for young boys even if the object of concern was the threat posed by predatory (and presumably effete) homosexuals rather than the sexual indiscretions of adolescent boys.

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